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No. 00-

IN THE

Supreme Court of the United States

STEVEN J. HOLMAN and KAREN L. HOLMAN,

Petitioners,

v.

STATE OF INDIANA and
INDIANA DEPARTMENT OF TRANSPORTATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Title VII's prohibition against discrimination against an individual "because of such individual's . . . sex" include the prohibition of a bi-sexual harassing both sexes because of sexual desire, i.e., is the employer of a bi-sexual harasser immune because the harasser victimized both a man and a woman?

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Petitioners, Steven J. Holman and Karen L. Holman (The "Holmans"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Holman v. State of Indiana et al.*, __ F.3d __ (7th Cir. 2000) (App. A). The opinion of the district court in *Holman v. State of Indiana et al.*, Cause No. 1:97-CV-0178 is attached hereto, as Appendix B, the Court's Memorandum of Decision and Order entered December 1, 1998. The original Order of the district court was entered on September 8, 1997, Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on May 1, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, provides in relevant part: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

The fundamental question in this case is whether male and female victims of a bi-sexual harasser are entitled to assert a Title VII claim of sexual harassment against the bi-sexual's employer. It arises in a context of the Holmans' complaint of sexual harassment wherein they identified the same harasser, and the dismissal of their complaint by the District Court in granting the State's Motion to Dismiss.

While employed at the Indiana Department of Transportation, Steve Holman and Karen Holman had the same shop foreman, Gale Uhrich, a male. Karen alleged that Uhrich sexually harassed her by often rubbing up against her, touching her body, standing closely to her and asking her to go to bed with him, and making sexist comments and otherwise exposing her to a sexually hostile work environment. Likewise, Steve Holman alleged that Uhrich sexually harassed him by grabbing his head and asking for sexual favors and then by retaliating against him when Holman refused.

In the proceedings below, the State filed a Motion to Dismiss, stating, in part, that, "Because Plaintiff's alleged that they were harassed by the same individual, neither Plaintiff had stated a claim of discrimination on the basis of sex." On September 8, 1997, the district court granted the State's Motion to Dismiss, reasoning that the Complaint alleged that Uhrich sexually harassed the Plaintiffs, a husband and wife of both genders, that the harassment was equally offensive to male and female workers, and that it was not harassment based on gender.

Petitioners filed a Motion to Reconsider on July 28, 1998, in part based upon this Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 140 L. Ed.

2d 201 (1998). On September 23, 1998, the Court issued an Order requesting additional briefing, recognizing that "several cases have come to the court's attention which contain language in support of Plaintiff's proposition, raised in their previous Motion to Dismiss and their Motion to Reconsider, that both the Plaintiffs may assert sexual harassment claims without regard to the alleged equal harassment of both genders . . . ". After further briefing, the district court issued a Memorandum of Decision and Order on or about December 1, 1998, affirming its prior Order of Dismissal, concluding that the equal opportunity harasser escapes the purview of Title VII liability, that the Holmans were equally harassed and were not discriminated against as to the terms or conditions of their employment, and that because both of the Holmans were equally harassed neither could continue in their claim of discrimination "because of sex." (App. B).

On appeal, the Seventh Circuit affirmed, "Because the complaint specifically and unequivocally claimed that the same supervisor had been sexually harassing the male and female Plaintiffs by soliciting sex from each on separate occasions and then had retaliated against each . . ." (App. A). The Seventh Circuit also determined that Steven and Karen did not plead in the alternative but pleaded in tandem, and that their claims did not survive dismissal under Rule 8(e)(2) of the Federal Rules of Civil Procedure. (App. A).

The import of the Court of Appeals and district court opinions is clear. In allowing bi-sexual harassers to escape the purview of Title VII, the opinion below implies that victims of sexual harassment by bi-sexuals have no remedy even though the bi-sexual's conduct was motivated by sexual desire, sometimes directed at a man and sometimes at a woman. Such a literal reading of Title VII ignores and

trivializes the impact upon the bi-sexuals victims — man, woman, or both. Such a limited view of Title VII also ignores that a harasser acting out of sexual desire, even if that desire is directed at both sexes, is acting "because of . . . sex".

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER COURT'S APPEALS RULINGS ON WHETHER EMPLOYERS OF BI-SEXUALS WHO COMMIT SEXUAL HARASSMENT ARE IMMUNE FROM LIABILITY UNDER TITLE VII.

The Holmans petition for writ of certiorari should be granted because the opinion below conflicts with other opinions of several Courts of Appeal on whether the victims of bi-sexual harassment state a claim for sexual harassment pursuant to Title VII.

The issue of the bi-sexual harasser and the immunity provided to his employer has little treatment by the Courts of Appeal, and none by this Court. In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the United States Court of Appeals, District of Columbia Circuit stated in a footnote:

> It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now — the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations, like that at

> Barnes are to be distinguished from a bi-sexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bi-sexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.

Id. at 990 n.55.

The Eleventh Circuit Court of Appeals, in *Ferdette v. BVP Management Associates*, 112 F.3d 1503 (11th Cir. 1997) also stated in a footnote:

> *See Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982) (dicta) ("Except in the exceedingly atypical case of a bi-sexual supervisor, it should be clear that sexual harassment is discrimination based upon sex.") . . .

Id at 902 n.5. These conservative views literally track Title VII's "discrimination" language, i.e., that Title VII only prohibits *discrimination*, and that a bi-sexual's harassment of both, men and women, is non-discriminatory, and therefore, does not violate Title VII.

But this literal reading of Title VII does not square with this Court's ruling that Title VII, although a anti-discrimination statute also prohibits sexual harassment. *See Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) (Title VII is violated by sexual harassment of two (2) types, quid pro quo and "hostile environment" harassment). This Court has recognized that "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not

discriminate against other members of their group." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998). The Court went on to hold that nothing in Title VII barred a claim of discrimination "because of . . . sex" merely because the Plaintiff and the Defendant were of the same sex. *Id* at 79. The Court in *Oncale* also found no justification in Title VII's language or the court's prior precedence for a categoric rule excluding same-sex harassment claims from the coverage of Title VII. *Id.* The Court stressed that Title VII's prohibition of discrimination "because of . . . sex" extended to "sexual harassment of any kind that meets the statutory requirements." *Id.* at 80.

The more enlightened approach is to hold bi-sexuals (or their employers) liable for sexual harassment even though the bi-sexual's sexual desires are directed at both males and females. First, the phrase in Title VII, "discrimination . . . because of . . . sex" does not exclude *sexual desire* outside of its purview — in fact, "because of sex" must naturally mean, "because of sexual motivation." Not that it has to — this Court in *Oncale* clearly stated, "but harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex . . ." *Id.* at 80. Furthermore, in the case of a bi-sexual, when he is directing his sexual attentions at a man he is at that moment discriminating against females because he is neglecting them in favor of the targeted male. Likewise, when he is targeting a female *at that moment*, he is discriminating against females because he is neglecting males who admittedly were his victims during prior episodes of harassment or who later may become his victims when he is no longer interested in his female targets.

The point is this — "discrimination . . . because of . . . sex" does not necessarily mean because of a *particular sex*, male or female. Presumably discrimination and harassment

"because of . . . sex" includes discrimination or harassment based upon sexual desire. Because bi-sexuals desire both men and women, and because the victims of bi-sexual harassment suffer no less the offensive, abusive, and intimidating actions of their perpetrator, bi-sexual harassment is not beyond the grasp of Title VII.

The Fifth Circuit Court of Appeals appeared to take this approach in *Butler v. Ysleta Independent School*, 161 F.3d 263, 270 (5th Cir. 1998), *dicta*:

> . . . To be sure, as the Supreme Court decided in *Oncale*, a man can be guilty of sexually harassing other men, and presumably an individual could be guilty of sexually harassing both men and women . . .

Petitioners recognize that even in *Butler*, the Fifth Circuit recognized that "the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." 161 F.3d at 271, quoting *Oncale* 523 U.S. at 80. Admittedly, petitioners are requesting this Court to retreat from this position, that "because of sex" *must* include difference in treatment between the sexes — a position that seems to have grown out of an analysis of cases wherein heterosexuals were harassing the opposite sex. *Meritor Savings Bank FSB v. Vincent*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Even in *Oncale*, the Court found harassment to exist where males harassed another man — not necessarily because of sexual desire — but because of other types of harassment that were directed at a male victim and no females, but Title VII's language does not contain a "bi-sexual immunity" clause. In the case of a bi-sexual, Title VII's prohibition of "discrimination . . . because of . . . sex"

must be deemed to prohibit harassment motivated by the bi-sexual's sexual desire, admittedly directed at both sexes, even though the bi-sexual discriminately harasses his male and female victims, depending upon his sexual preference at the moment.

The opinion below, *Holman v. State of Indiana*, __ F.3d __ (7th Cir. 2000), is the clearest example of how a literal reading of Title VII permits sexual harassment rather than prohibiting it. Title VII, and this Court's interpretive guidance in implementing it, must grow with the times. The Seventh Circuit applied either a same-sex or opposite-sex formula, which simply does not fit the "bi-sexual harasser". What the Seventh Circuit ignored is that a bi-sexual's indiscriminate harassment of both men and women is, nevertheless, harassment "because of . . . sex." While harassing a man and neglecting a woman (for the moment), the bi-sexual is discriminating (at the moment). A more appropriate application of Title VII is that bi-sexual harassment actually causes the employer of the bi-sexual to be more open to a charge of sexual harassment as opposed to providing immunity against sexual harassment, because the bi-sexual is discriminating against both sexes (by choosing one as opposed to the other, for the moment). This broad reading of Title VII is consistent with this Court's reluctance to categorically form an exclusionary rule with respect to a certain class of sexual beings and is consistent with the holding in *Oncale*: "Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." 523 U.S. at 79-80.

CONCLUSION

This case presents a question of exceptional importance — whether victims of bi-sexual harassment are entitled to assert claims under Title VII. If the opinion below is allowed to stand, bi-sexual harassers (and their employers) will be allowed to continue sexual harassment because of their sexual desires, even though that desire is directed at men, and also at women. Title VII is not a "bi-sexual immunity" statute — it prohibits sexual harassment in the workplace. By granting the Holmans' petition for certiorari, this Court can correct the Seventh Circuit's decision, which defies this Court's open-ended analysis of Title VII by permitting all victims of sexual harassment, regardless of the sex of their harasser to assert their rights under Title VII.

Accordingly, the Holmans respectively request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MAY 1, 2000

STEVEN J. HOLMAN and Karen L. Holman,

Plaintiffs-Appellants,

v.

STATE OF INDIANA and Indiana Department of Transportation,

Defendant-Appellee.

No. 99-1355.

United States Court of Appeals, Seventh Circuit.

Argued November 4, 1999.

Decided May 1, 2000.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division, No. 97 C 178 — William C. Lee, Chief Judge.

Before MANION, KANNE, and EVANS, Circuit Judges.

MANION, Circuit Judge.

In their Title VII suit filed in federal court, Steven and Karen Holman alleged that their supervisor at the Indiana

Department of Transportation had sexually harassed each of them individually and on separate occasions, and because they had rejected his sexual solicitations the supervisor retaliated against each of them with certain deprivations. The district court held that the Holmans' complaint of an "equal opportunity harasser" failed to state a claim of sex discrimination under Title VII. See Holman v. State of Indiana, 24 F. Supp.2d 909, 915 (N.D.Ind. 1998) (denying plaintiffs' motion for reconsideration). Because the complaint specifically and unequivocally claimed that the same supervisor had been sexually harassing the male and female plaintiffs by soliciting sex from each on separate occasions and then had retaliated against each, we affirm the district court.

I. Background

Steven and Karen Holman are married and both work in the maintenance department at the Indiana Department of Transportation (IDOT). On May 21, 1997, they filed this action against the State of Indiana and the IDOT under Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e et seq., and the Equal Pay Act (EPA), 29 U.S.C. § 206(d).[1] In paragraph 4(b) of the complaint, Karen alleged

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1. Although not raised by the parties, we assume the IDOT, and not the State of Indiana generally, has "actual hiring and firing responsibility" as to the Holmans and is thus their "employer" for purposes of Title VII. Hearne v. Board of Educ. of City of Chicago, 185 F.3d 770, 777 (7th Cir. 1999) ("Title VII actions must be brought against the 'employer.' In suits against state entities, that term is understood to mean the particular agency or part of the state

(Cont'd)

that "[s]ince December of 1995," her male shop foreman, Gale Uhrich, "began sexually harassing [her] by touching her body, standing too closely to [her], asking her to go to bed with him and making sexist comments and otherwise making [her] work in a sexually hostile work environment." Holman, 24 F. Supp.2d at 911. In paragraphs 4(c) and 4(d), she also alleged that when she rebuffed and protested Uhrich's "sexual propositions," he retaliated against her, and that she "has been denied equal pay for equal work." Id. In paragraph 6(b) of the complaint, Steven similarly alleged that "since August of 1995" Uhrich, who was also his foreman, "had sexually harassed [him] by grabbing his head while asking for sexual favors which requests were refused." Id. And in paragraph 6(c), Steven, too, alleged that Uhrich retaliated against him both for "refusing to 'give-in' to [Uhrich's] request for sexual favors" and "as a result of his affiliation with his wife, Karen L. Holman, who filed [internal] sexual harassment charges against Uhrich." Id. In paragraphs 5 and 7, both Karen and Steven sought compensatory damages under Title VII for the lost income, mental anguish, and stress they had suffered as a result of Uhrich's "sexual harassment and retaliation." (Karen also sought damages under the EPA for being paid "less money than similarly situated males." Complaint, ¶ 5.)

(Cont'd)
apparatus that has actual hiring and firing responsibility."). As a result, the Holmans cannot maintain Title VII claims against the State of Indiana. Id. (holding that because "[n]either the Governor's office, the State of Illinois as a whole, nor the IELRB is the 'employer' for Title VII purposes . . . the case against these defendants [is at an end].").

The IDOT moved to dismiss the Holmans' Title VII sexual harassment claims under Fed.R.Civ.P. 12(b)(6). On September 8, 1997, the district court granted the motion, holding that "because both plaintiffs were alleging sexual harassment by the same supervisor, they both, as a matter of law, could not prove that the harassment occurred 'because of sex.' " Holman, 24 F. Supp.2d at 910. The Holmans moved the district court to reconsider its order in light of Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). See Holman, 24 F. Supp.2d at 910. The court denied the "motion for reconsideration with respect to the argument that Oncale altered [its] prior ruling," but it took its prior order under advisement and ordered supplemental briefing so the parties could address cases "which contained language" that supported the Holmans' argument that they both "could maintain a cause of action for sexual harassment." Id. After thoroughly surveying the applicable law, the district court denied the Holmans' motion for reconsideration and reinstated its order dismissing their sexual harassment claims. Id. at 916. Because the Holmans' retaliation and equal pay claims remained, the court certified its dismissal of their harassment claims pursuant to Fed.R.Civ.P. 54(b). See Granack v. Continental Cas. Co., 977 F.2d 1143, 1144-45 (7th Cir. 1992).[2] The Holmans appeal the dismissal of this

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2. The Eleventh Amendment does not bar the Holmans' Title VII claims. See Fitzpatrick v. Bitzer, 427 U.S. 445, 448-449, 456 (1976); Velasquez v. Frapwell, 160 F.3d 389, 395 (7th Cir. 1998), vacated in part on other grounds, 165 F.3d 593, 594 (7th Cir. 1999). Although not before us, we note that the viability of Karen Holman's EPA claim, however, is now questionable in light of Kimel v. Florida Bd. of Regents, 120 S.Ct. 631, 639, 650 (2000) (holding that the

(Cont'd)

claim, and we have jurisdiction over it under 28 U.S.C. § 1291 as a final decision. See King v. Gibbs, 876 F.2d 1275, 1277 (7th Cir. 1989). The Equal Employment Opportunity Commission (EEOC) appears as amicus curiae in support of the Holmans.

II. Discussion

We review de novo a dismissal of a claim under Rule 12(b)(6), accepting as true all facts alleged in the complaint and drawing all reasonable inferences from them in the plaintiff's favor. Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997). "We will affirm the dismissal of a complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " Id. (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

A. Title VII's Requirement of Discrimination and the "Equal Opportunity Harasser"

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of sex: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his

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(Cont'd)
ADEA did not validly abrogate states' Eleventh Amendment immunity). See Varner v. Illinois State Univ., 150 F.3d 706, 717 (7th Cir. 1998) (holding that EPA abrogated Eleventh Amendment immunity), vacated and remanded in light of Kimel, 120 S.Ct. 928 (2000).

compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The purpose of this provision is to prevent " 'disparate treatment of men and women in employment,' " regardless of its form. Oncale, 523 U.S. at 78 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)). Whenever, therefore, " 'the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.' " Id. (emphasis added) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)).

In Oncale, the Supreme Court reiterated that "Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women," id., and it held that this prohibition applies to the same-sex harasser, whether or not that harasser is motivated by sexual desire. See id. at 79-80 ("If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."). In doing so, it underscored that the touchstone of Title VII is, of course, discrimination or disparate treatment. Oncale — although a unanimous decision, only a few pages long — said so no less than four times, id. at 79-81 and more than once with emphasis. See id. at 80 ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discrimina[tion] . . . because of . . . sex.' ") (emphasis in original). Indeed, Justice Thomas specifically (and pointedly, quite briefly) concurred to highlight that

premise: "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.' " Id. at 82.

The Court explicated what it meant by "discrimination" in sexual harassment cases; it is to be determined on a gender-comparative basis: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id. at 80 (emphasis added) (quoting Harris, 510 U.S. at 25 (Ginsburg, J., concurring)). This inquiry applies to both same and opposite-sex harassment. Id. at 80-81 ("A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes . . . ."). "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue . . . actually constituted 'discrimina[tion] . . . because of . . . sex.' " Id. at 81 (emphasis in original). Thus a violation of Title VII only occurs because of sex discrimination.

Both before and after Oncale, we have noted that because Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly). See Pasqua v. Metropolitan Life Ins. Co., 101 F.3d

514, 517 (7th Cir. 1996) ("Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex."); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1011 (7th Cir. 1999) ("Although we readily acknowledge that the factfinder could infer from such evidence that Jemison's harassment was bisexual and therefore beyond the reach of Title VII . . . ."); see also Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) ("There may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, sexual harassment would not be based on sex because men and women are accorded like treatment . . . . [and] the plaintiff would have no remedy under Title VII."). As a result, the unfortunate objects of such harassment may be limited to state law for a remedy. See Johnson v. Hondo, Inc., 125 F.3d 408, 410 (7th Cir. 1997) (besides Title VII sexual harassment claim, plaintiff alleged five state law causes of action, including assault, battery, and intentional infliction of emotional distress); Henson, 682 F.2d at 904.

The Holmans do not really address Oncale's emphasis on the statutory requirement of discrimination. And amicus EEOC candidly admits that under Pasqua and Shepherd, this circuit does not recognize Title VII sexual harassment claims in the case of the "equal opportunity" harasser. Instead, both say that exempting the "equal opportunity" harasser from Title VII would be an anomalous result and bad policy (it would, they argue, encourage harassers to manufacture a second harassment of a different sex so they could insulate

themselves from Title VII liability). They cite pre-Oncale decisions, including one vacated by the Supreme Court, Doe by Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997), vacated and remanded in light of Oncale, 523 U.S. 1001 (1998). Those cases recite or suggest the same policy complaint. See McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) ("It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.").

We do not think, however, that it is anomalous for a Title VII remedy to be precluded when both sexes are treated badly. Title VII is predicated on discrimination. Given this premise, requiring disparate treatment is consistent with the statute's purpose of preventing such treatment. Oncale, 523 U.S. at 78 (congressional intent is to prevent "disparate treatment of men and women in employment."). It is likewise consistent with the statute's plain language. See 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice . . . to otherwise discriminate . . . ."). If anything, it would be anomalous not to require proof of disparate treatment for claims of sex discrimination (of which sexual harassment is a subset), yet that is essentially what the Holmans urge. To do so would change Title VII into a code of workplace civility, and the Supreme Court has already rejected such an interpretation of Title VII. In Oncale, the Court in fact explained that one way to ensure that Title VII does not mutate from a prohibition on sexual discrimination to a general prohibition on harassment is to be faithful to the statute's plain language, and by that it meant requiring a demonstration that there be different treatment of the sexes.

> But that risk . . . is adequately met by careful attention to the requirements of the statute. Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discriminat[ion] . . . because of . . . sex." . . . "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

523 U.S. at 80 (emphasis in original) (quoting Harris, supra).[3]

Furthermore, the Holmans' theory that sexual harassers will attempt to insulate themselves and their employers from liability by purposely harassing members of both sexes in order to disguise their real intent seems unrealistic. It is hard to imagine that would-be harassers will know the intricacies of sexual harassment law and will manufacture additional harassments to attempt to avoid Title VII liability, particularly when doing so will increase their risk of being fired, sued under state law, and ostracized. Surely attorneys will not advise their employer-clients to instruct their employees to harass still more people — to commit, in most cases, state law torts — which could subject their clients to lawsuits and themselves to claims of malpractice and charges

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3. The other "requirement that prevents Title VII from expanding into a general civility code" is interpreting the statute not to "reach genuine but innocuous differences in the ways men and women routinely interact . . . [I]t forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." Id. at 81.

of professional misconduct. Moreover, if attorneys were actually to dispense such incredible advice, and their clients were to follow it, the clients would still be subject to Title VII liability. In such cases the harasser is not a bona-fide "equal opportunity" harasser; he is manufacturing another harassment to avoid Title VII liability.[4]

These extreme hypotheticals aside, the Holmans and the EEOC still express public policy concerns that "authentic" bisexual or equal-opportunity harassers are not covered by Title VII. But it is for Congress to decide whether to address bad workplace behavior that cannot be labeled discriminatory. It is not the province of federal courts to expand the language of a statute that is clearly limited. Title VII covers only sex discrimination.

B. The Holmans' Sexual Harassment Claims

The district court dismissed the Holmans' sexual harassment claims, concluding that the Holmans could not claim discrimination because they had alleged that their supervisor had been sexually harassing both of them by soliciting sex from each of them. Thus, applying Oncale, the district court reasoned that "neither was subjected to disadvantageous terms or conditions of employment to which members of the other sex were not exposed." Holman, 24 F. Supp.2d at 915. We agree.

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4. In this case, as we shall see, the Holmans are precluded from making such an argument because they have alleged that Gale Uhrich sexually harassed each of them.

The Holmans seem to assert that even if Title VII does not cover the "equal opportunity" harasser, the district court erred in dismissing their sexual harassment claims because it is possible, under some set of facts, for at least one of them to maintain a claim for sexual harassment. They do not explain, however, how one of them could do so under the present allegations that Uhrich had been sexually harassing both of them by sexually propositioning each of them, and thus was not discriminating against either of them. We accept the complaint at its face value and will not speculate over how it could have some other meaning. See Liu v. T&H Machine, Inc., 191 F.3d 790, 795 (7th Cir. 1999) ("We are not obligated to guess at a party's meaning, however, and arguments insufficiently developed on appeal are waived.").[5]

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5. The closest the Holmans come is asserting in their reply brief that had they "been permitted to do discovery, it may be unearthed that one Appellant may have been the victim of sexual harassment while the other is a victim of retaliation." This argument was not properly presented. United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000) (arguments not raised until reply brief are waived). But assuming it were, the Holmans would be hypothesizing about facts that are inconsistent with the complaint (discussed infra): the Holmans specifically pleaded that their supervisor sexually harassed both of them and retaliated against both of them. Similarly, they assert at oral argument for the first time that the evidence could show that the harassment of Mr. Holman was not sufficiently severe or pervasive. Lear v. Cowan, No. 99-2564, 2000 WL 291376, at *2 (7th Cir. March 21, 2000) (arguments raised for the first time at oral argument are waived). But this, too, is inconsistent with the complaint: by pleading that he was sexually harassed in violation of Title VII, Steven is alleging, by definition, that the harassment was severe or pervasive. It is also inconsistent with what the Holmans told us at oral argument: "Now we are arguing today that both of them, at least at this stage, suffered the type of harassment which is actionable and pervasive . . . ."

The Holmans contend that under Rule 12(b)(6), their sexual harassment claims cannot be dismissed unless it is impossible to establish a claim under any set of facts. But the Holmans only have it half right. While their claims may not be dismissed under Rule 12(b)(6) unless they cannot prove a claim under any set of facts, those facts must be consistent with the allegations of the complaint. Hishon, 467 U.S. at 73. Thus, while the Holmans can allege (hypothesize) new facts on appeal, such facts are irrelevant if not consistent with the complaint. Stevens v. Umsted, 131 F.3d 697, 705 (7th Cir. 1997) ("This court has held that when reviewing Rule 12(b)(6) motions, we will consider new factual allegations raised for the first time on appeal provided they are consistent with the complaint."). Accord American Inter-Fidelity Exchange v. American Re-Insurance Co., 17 F.3d 1018, 1022 (7th Cir. 1994); Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992). Because the complaint clearly pleaded that Uhrich had been separately sexually harassing both Karen and Steven by propositioning them, it is inconsistent (and thus improper) for the Holmans now essentially to propose that he did not.[6]

Similarly, every new scenario amicus EEOC proposes contradicts the Holmans' allegations and assumes that Uhrich did not really sexually harass either Steven or Karen. For example, the EEOC argues that the facts could show that

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6. This case is thus different from Shepherd, where the plaintiff did not plead that the supervisor had been sexually harassing both a man and a woman. 168 F.3d at 1011 (question as to whether the plaintiff had a viable Title VII sexual harassment claim was raised by evidence that the coworker may have harassed both men and women).

Uhrich harassed Karen out of spite because he was jealous of her relationship with her husband (with whom Uhrich really wanted to have sexual relations) and thus was not really an "equal opportunity" harasser. But speculating that Uhrich propositioned and accosted Karen Holman because she was married or loyal to her husband, is inconsistent with the complaint, which alleges that Uhrich "sexually harassed" her "in violation of Title VII," which, by definition, simply means that he harassed her because she was a woman. See 42 U.S.C. § 2000e-2(a)(1); see also Sweeney v. West, 149 F.3d 550, 555 (7th Cir. 1998); Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 965 (8th Cir. 1999). The EEOC cannot essentially "amend the complaint on appeal to state a new claim . . . ." American Inter-Fidelity Exchange, 17 F.3d at 1022; see also Dawson, 977 F.2d at 372-373 ("Of course, a plaintiff may not argue on appeal that a contract consisted of Y when the complaint alleged that the contract consisted of X.").[7]

Additional discovery, then, would not save the Holmans' sexual harassment claims. Their problem is that the

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7. The EEOC also argues that the Holmans' sexual harassment claims should not be dismissed because the evidence could show that Uhrich sexually harassed them in ways unique to their sex (evidently, meaning in terms of their different body parts). Given the (obvious) differences in male and female anatomy, that Uhrich would do so hardly seems remarkable. More to the point, under this theory either Uhrich sexually harassed both the Holmans (as they alleged), in which case he would not be discriminating against either of them (and we would be back to where we started), or he did not sexually harass one of them, which would be a scenario inconsistent with the complaint.

allegations in their complaint are very precise; the complaint simply and clearly says that their supervisor was sexually harassing each of them by asking for sexual favors. As a matter of law, then, neither of them has a claim for discrimination under Title VII. Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995) ("More is not necessarily better under the Federal Rules; a party 'can plead himself out of court by . . . alleging facts which . . . demonstrate that he has no legal claim.' ") (quoting Trevino v. Union Pacific R.R. Co., 916 F.2d 1230, 1234 (7th Cir. 1990)).

Recognizing the difficulty in which their complaint has placed them, the Holmans hopefully contend that they have pleaded in the alternative — that they really have alleged that Uhrich harassed either Karen or Steven, but not both of them. See Fed.R.Civ.P. 8(e)(2). It should be noted that this argument is at odds with what they told us earlier in oral argument[8] and in their briefs.[9] Moreover, the Holmans did not make this argument in their initial appellate brief (in fact, they did not make it until rebuttal at oral argument) and thus it is waived. See Lear, 2000 WL 291376, at *2. But assuming

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8. "Mr. and Mrs. Holman worked for the State of Indiana. They were sexually harassed by the same supervisor. They filed a complaint in court by which each of them alleged sexual harassment by the same supervisor."

9. "At this stage, Plaintiffs have alleged in their complaint that Mr. Uhrich's intended targets were both Steven and Karen Holman." Initial Brief at 14 (emphasis added); see also id. (emphasis in original) ("Both Steven and Karen Holman should be able to pursue their respective harassment claims because they were both harassed 'because of' their gender.").

this argument were properly presented, it is not possible, even by generously reading the complaint, to construe it as pleading the Holmans' sexual harassment claims in the alternative. Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 62 (1st Cir. 1992) (Rule 8(e)(2) allows alternative and hypothetical pleading. "Plaintiff's assertion, however, . . . was not made in the context of an alternative or hypothetical pleading."). While the Holmans need not use particular words to plead in the alternative, they must use a formulation from which it can be reasonably inferred that this is what they were doing. See id. (citing 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1282 at 525 (2d ed. 1990) (generally an alternative claim is drafted in the form of "either-or" and a hypothetical claim is in the form of "if-then")). The "liberal construction accorded a pleading under Rule 8(f) does not require the courts to fabricate a claim that a plaintiff has not spelled out in his pleadings." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1286 at 558 (2d ed. 1990), quoted in Schott, 976 F.2d at 62. And while we must draw reasonable inferences in the Holmans' favor, we should not draw inferences that while theoretically plausible are inconsistent with the pleadings. Ledford, 105 F.3d at 356. Here, the Holmans did not attempt to plead in the alternative; they clearly pleaded in tandem. Both claimed, without equivocation, that Uhrich sexually harassed (and then retaliated against) each of them, and we cannot change that alleged fact. City Nat'l Bank of Fla. v. Checkers, Simon & Rosner, 32 F.3d 277, 281 (7th Cir. 1994).

III. Conclusion

For the foregoing reasons, the order of the district court dismissing the plaintiffs' sexual harassment claims is

AFFIRMED.

Appendix A

EVANS, Circuit Judge, concurring.

As Judge Manion correctly points out, our cases indicate that the equal opportunity harasser may often not be discriminating against either sex and, as we know, discrimination is the essence of Title VII. We also have indicated that it might be possible for a plaintiff to show an exception: that the equal opportunity harasser engaged in such sex specific and derogatory behavior as to reveal an "antipathy to persons of the plaintiff's gender," thus allowing for the possibility that a plaintiff could prove that an equal opportunity harasser was not harassing so equally after all and was, in fact, discriminating against one sex or the other. See Shepherd v. Slater Steels Corp., 168 F.3d 998, 1008 (7th Cir. 1999). I write separately only to note that the recognition of that possibility eliminates what otherwise seems to be a troubling clash with Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1998). The workplace in Oncale had eight employees, all male. Nevertheless, the court concluded that it would be possible to find harassment — that it would be possible, therefore, to find discrimination. If "discrimination" is possible in a single-sex workplace, it might also be possible in some circumstances in which we find an equal opportunity harasser. Because this case comes to us on a complaint full of facts which reveal Uhrich to be a true equal opportunity harasser, I join the opinion.

APPENDIX B — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION DATED DECEMBER 1, 1998

Steven J. HOLMAN, and Karen L. Holman,

Plaintiffs,

v.

STATE OF INDIANA and Indiana Department of Transportation,

Defendant.

No. 1:97 CV 0178.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

Dec. 1, 1998.

* * *

MEMORANDUM OF DECISION AND ORDER

WILLIAM C. LEE, Chief Judge.

This matter is before this court upon its request for further briefing from the parties concerning the court's previous ruling, dated September 8, 1997, granting

Appendix B

Defendants, State of Indiana ("State") and Indiana Department of Transportation's ("INDOT") (collectively, the "defendants") Motion to Dismiss plaintiffs Title VII sexual harassment claims. In that Order, the court determined that because both plaintiffs were alleging sexual harassment by the same supervisor, they both, as a matter of law, could not prove that the alleged harassment occurred "because of sex." Plaintiffs, Karen and Steven Holman (collectively, "plaintiffs" or "the Holmans"), filed a motion to reconsider this court's Order on the basis of *Oncale v. Sundowner Offshore Services, Inc.*, __ U.S. __, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). On September 23, 1998, this court entered an order denying plaintiffs motion for reconsideration with respect to the argument that *Oncale* altered the court's prior ruling. However, in reviewing the motion for reconsideration, several cases came to the court's attention which contained language in support of the plaintiffs' argument that both plaintiffs could maintain a cause of action for sexual harassment. At this juncture, the court determined that its prior Order should be taken under advisement pending further briefing by the parties on the issue. On September 30, 1998 plaintiffs filed their supplemental brief in support of their motion to reconsider. Subsequently, on October 22, 1998 defendants filed their supplemental brief to which plaintiffs responded with their cross brief on October 29, 1998. Briefing was completed on November 2, 1998 after defendants filed their cross-brief. Thus, the court shall now reconsider its prior Order.

Appendix B

APPLICABLE STANDARD

The court begins by noting that "motions to reconsider are not ill-founded step-children of the federal court's procedural arsenal, but rather effective yet quite circumscribed methods of 'correct[ing] manifest errors of law or fact or to present newly discovered evidence.' " *In re August, 1993 Regular Grand Jury,* 854 F.Supp. 1403 (S.D.Ind.1994) *quoting Keene Corp. v. International Fidelity Ins. Co.,* 561 F.Supp. 656, 665-66 (N.D.Ill.1982). A court is neither obligated nor foreclosed from reconsidering its prior decisions. In matters involving interlocutory orders, such as motions to dismiss, or matters that have not been taken to judgment or determined on appeal, the Seventh Circuit has made clear that the district courts have the discretion to reconsider their decisions at any time. *Cameo Convalescent Center, Inc. v. Percy,* 800 F.2d 108, 110 (7th Cir.1986). Accordingly, the court notes that it has ample authority for reconsidering its previous order on defendants' motion to dismiss.

A motion to dismiss challenges the sufficiency of the plaintiff's complaint for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss for failure to state a claim should be granted only if the plaintiffs could prove no set of facts, consistent with their complaint and attachments, upon which the defendants could be liable. *Pickrel v. City of Springfield, Ill.,* 45 F.3d 1115, 1118 (7th Cir.1995); 65 F.3d 664. Documents attached to the complaint can be considered by the district court, particularly where the documents are referenced throughout the complaint. *See Siefken v. Village of Arlington Heights,* 65 F.3d 664, 666 (7th Cir.1995).

Appendix B

"When a federal court reviews the sufficiency of a complaint . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). "A complaint . . . should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In determining the propriety of dismissal under Fed.R.Civ.P. 12(b)(6), the court "must accept as true all well-pled factual allegations in the complaint and draw all reasonable inferences therefrom in favor of the plaintiff." *Perkins v. Silverstein,* 939 F.2d 463 (7th Cir.1991). *See also Gomez v. Illinois State Bd. of Education,* 811 F.2d 1030, 1032-33 (7th Cir.1987). The purpose of the motion to dismiss is to test the legal sufficiency of the complaint and not to decide the merits. *Triad Assoc., Inc. v. Chicago Housing Auth.,* 892 F.2d 583, 586 (7th Cir.1989). "If it appears beyond doubt that plaintiff can prove any set of facts consistent with the allegations in the complaint which would entitled them to relief, dismissal is inappropriate." *Perkins,* 939 F.2d at 466. Further, the court must "construe pleadings liberally, and mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss." *Strauss v. City of Chicago,* 760 F.2d 765, 767 (7th Cir.1985). Keeping this standard in mind, the court proceeds to reconsider defendants motion to dismiss.

Appendix B

APPLICABLE FACTS

Plaintiffs instituted the present action alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the Equal Pay Act, 29 U.S.C. § 206 arising out of their employment relationship with the defendants. The Holmans are husband and wife and, at all times relevant to their complaint, were employed by the defendants as maintenance workers. (Complaint, ¶¶s 4(a), 6(a)). Both plaintiffs reported to Gale Uhrich ("Uhrich"), a male shop foreman. (Complaint, ¶¶s 4(a), 6(b)). Plaintiff, Karen Holman, alleges that Uhrich sexually harassed her by "touching her body, standing too closely to her, asking her to go to bed with him and making sexist comments and otherwise making Plaintiff work in a sexually hostile work environment." (Complaint, ¶ 4(b)). In addition, she contends that as a result of her refusal to perform the acts requested by Uhrich, he negatively altered her evaluations and otherwise retaliated against her for protesting his harassing behavior. (Complaint, ¶ 4(c)). Karen Holman also asserts a claim that she has been denied equal pay for equal work. (Complaint, ¶ 4(d)).

In the same complaint, Plaintiff, Steven Holman, alleges that Uhrich also sexually harassed him by "grabbing his head while asking for sexual favors." (Complaint, ¶ 6(b)). When Steven Holman refused such requests, he alleges that Uhrich retaliated by unlocking his locker and throwing away his belongings. (Complaint, ¶ 6(c)). In addition, Steven Holman claims that he suffered retaliation from Uhrich due to his wife's filing internal discrimination charges against Uhrich. (Complaint, ¶ 6(c)).

Appendix B

DISCUSSION

I. *Previous Order on Motion to Dismiss*

In the court's initial ruling on defendants motion to dismiss, the court resolved the unique issue of whether both the Holmans, as a matter of law, could maintain sexual harassment claims where they *both* suffered harassment of a sexual nature by the same individual. First, the court noted that the gravamen of any sexual harassment claim is that the plaintiff suffered discrimination "because of sex." Considering the facts as alleged in the instant case, the court determined that because the acts of the alleged harasser in this case were equally harassing to both plaintiffs, neither could prove that the alleged harassment occurred "because of sex." In support of this conclusion, the court cited *Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir.1996), which held that "harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex." *Pasqua*, 101 F.3d at 517. As a result, because Uhrich accorded the Holmans like treatment, the court determined that both the Holmans could not maintain claims of sexual harassment. The court now revisits this issue in light of the additional case authority and briefs submitted by the parties.

II. *Reconsideration of Original Order*

From the outset, the court is reminded that a motion to dismiss tests the legal sufficiency of the complaint and does not decide the claims on the merits. *Triad Assoc., Inc. v.*

Chicago Housing Auth., 892 F.2d 583, 586 (7th Cir.1989). Thus, regardless of whether the Holmans have alleged solid or weak claims, the question posed to this court is whether the claims, as pled by plaintiffs, state a claim for relief. Upon reexamining the issue, the court concludes that plaintiffs do not state a claim for relief.

An employee asserting a claim of hostile work environment sexual harassment must prove the following: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the harassment was sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-73, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). At issue in the present case is whether plaintiffs meet the third requirement, i.e., that the harassment is based on sex.

The "based on sex" element has increasingly been placed under fire in the context of same-sex sexual harassment and equal opportunity harassment claims. The Supreme Court recently reaffirmed the principle that Title VII sexual harassment claim is directed only at "discrimination . . . because of . . . sex" in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, __, 118 S.Ct. 998, 1002, 140 L.Ed.2d 201 (1998). Accordingly, the ultimate inquiry for a sexual harassment plaintiff is whether he or she can prove "that the conduct at issue was not merely tinged with

offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.' " *Id.* Defendants argue, as they did in their original briefs, that two plaintiffs, one male and one female, cannot prove, as a matter of law, that the harassment occurred "because of . . . sex" where they each were accorded like harassing treatment by a supervisor. Thus, under defendants theory, the "equal opportunity harasser" is insulated from liability. In response, plaintiffs point to numerous cases which hold that insulating the "equal opportunity harasser" from liability is an unintended result of the "because of sex" distinction; thus, it is no defense to sexual harassment that a supervisor harasses both males and females alike.

The saga of the "equal opportunity harasser" has sparked numerous debates among scholars and courts concerning the viability of sexual harassment claims where the conduct is spread evenly between both genders.[1] Based, in part, upon the theory that equal harassment is not gender discrimination as required for Title VII liability, sexual harassment defendants often invoke the bisexual harasser defense and

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1. Numerous scholarly articles exist on this subject which debate the propriety of the current state of sexual harassment jurisprudence. *See The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII,* Stephen S. Locke, 27 Rutgers L.J. 383 (1996); *A Rose By Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment, Robert Brookins,* 46 Drake L.Rev. 441 (1998); *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases,* Sandra Levitsky, 80 Minn.L.Rev. 1013 (1996); *What's Wrong with Sexual Harassment?,* Katherine M. Franke, 49 Stan.L.Rev. 691 (1997).

the equal opportunity harasser defense to avoid liability for their offensive conduct.[2] These defenses succeed because the "equal opportunity harasser" does not treat plaintiffs differently than members of the opposite sex; indeed, by definition the harasser equally harasses both sexes. Thus, under current sex discrimination theories, there is no discrimination when something happens to both sexes and not simply to one.

Perhaps the Supreme Court's recent decision in *Oncale* is an appropriate starting point for the court's analysis in the present case. *Oncale* clearly articulates that "Title VII's prohibition of discrimination 'because of sex' protects men as well as women." *Oncale*, 523 U.S. at __, 118 S.Ct. at 1001. Thus, it is now well-settled that both the Holmans are protected from sexual harassment under Title VII regardless of the gender of the harasser or the harasser's sexual orientation. *Oncale*, 523 U.S. at __, 118 S.Ct. at 1002. However, this is true only if the discrimination occurred "because of . . . sex." *Id.* To determine whether the discrimination occurred because of sex, *Oncale* teaches that

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2. In addition to these defenses, a third defense arises in the context of the all-male or all-female work environment. In such cases where same-sex harassment is alleged and the environment exists solely of a single gender, there is clearly no evidence which could be presented to show that employees of the opposite gender were treated differently. *See Shermer v. Illinois Department of Transportation*, 937 F.Supp. 781 (C.D.Ill.1996). In *Shermer*, a male supervisor was accused of harassing a male employee in an all-male environment. The defendant argued that "because it was impossible for the defendant to treat women differently because none were present, Plaintiff cannot prove that he was treated differently from women."

the critical issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.*

Under the Supreme Court's analysis, presumably, if members of one sex are exposed to identical disadvantageous terms or conditions of employment as the other sex, there is no Title VII discrimination. Such a reading gives legitimacy to the various courts' findings that no liability exists where both males and females in the workplace are accorded like treatment. *See Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir.1996) ("[H]arassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex."); *Henson v. City of Dundee*, 682 F.2d 897, 904, 905 n. 11 (11th Cir.1982) ("There may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, sexual harassment would not be based on sex because men and women are accorded like treatment . . . and the plaintiff would have no remedy under Title VII."); *Fair v. Guiding Eyes for the Blind, Inc.*, 742 F.Supp. 151, 156 (S.D.N.Y.1990) ("If the acts complained of would be equally offensive to both sexes, then the subject of the harassment cannot claim to have been singled out because of her sex.").

Without question, these authorities give rise, in the present case, to defendants argument that, as a matter of law, it is impossible for the Holmans to demonstrate that one of them was exposed to disadvantageous terms or conditions

of employment to which the other was not since they both allege equal harassment. As evidenced by *Oncale,* the gravamen of a discrimination claim is a showing of disparate treatment. However, on several occasions prior to the Supreme Court's decision in *Oncale,* the Seventh Circuit Court of Appeals has indicated a willingness to accept a claim of sexual harassment by both male and female employees against the same individual. *See McDonnell v. Cisneros,* 84 F.3d 256 (7th Cir.1996); *Doe v. City of Belleville,* 119 F.3d 563 (7th Cir.1997), *judgment vacated* __ U.S. __, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998). Although the facts in these cases are not similar to the facts presently before this court, the language used by the Seventh Circuit in resolving these cases supports plaintiffs' contentions that they both may maintain a claim for sexual harassment.

For instance, in *McDonnell v. Cisneros,* the court was faced with a sexual harassment claim brought by both a male and a female employee alleging harassment stemming from an abusive investigation of charges that the employees engaged in job-related sexual misconduct. The complaint alleged that the process of investigating the anonymous complaint created the harassing environment. The Seventh Circuit, while affirming the lower court, did so, not because the plaintiffs could not prevail on claims of harassment by the same employer, but instead because the allegations that the investigation itself was harassing would create an untenable scenario for employers investigating charges of sexual harassment. *McDonnell,* 84 F.3d at 261 ("But if, because the employer wants to demonstrate how seriously he takes such charges, the investigation oversteps the proper bounds, causing humiliation to the targets of the

investigation, the employer will, under the interpretation of the law that the plaintiffs urge in this case, also be guilty of sexual harassment."). With respect to whether both the plaintiffs could sustain a claim, however, the court indicated that they could do so:

> . . . [T]he government urges us to affirm the dismissal of the plaintiffs' claim of sexual harassment on the ground that, since the harassment was impartially directed against the male and female accused of improper sexual activity, there was no discrimination on grounds of sex. We do not find this class of arguments compelling and are rather surprised to find the Department of Justice urging them . . . It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.

McDonnell, 84 F.3d at 260 (internal citations omitted).

Similarly, in *Doe,* the Seventh Circuit, while faced primarily with the issue of same-sex harassment, provided a detailed analysis of hostile work environment sexual harassment. In doing so, the Seventh Circuit stated that "sexual epithets often directed at women, such as 'cunt' and 'bitch' clearly reflect the gender-based nature of the animus that motivates them." *Id.* at 577 n. 10. The court further articulated that "we must question whether it is appropriate to view sexual harassment as actionable sex discrimination

only when the plaintiff is able to show that she was harassed because she was a woman rather than a man, or vice versa." *Id.* at 577. Under the Seventh Circuit's view, proof that "the harasser was motivated to target one gender and not the other may be necessary where the harassment is not on its face sexual . . . but such proof would seem unnecessary when the harassment itself is imbued with sexual overtones." Thus, in this case, the Seventh Circuit determined that the sexual nature of the harassment itself meets the "because of sex" requirement.[3]

In addition to the Seventh Circuit's thoughts on the subject, district courts situated within the Seventh Circuit have taken a similar position. In *Miller v. Vesta,* 946 F.Supp. 697 (E.D.Wis.1996), the court determined that disparate treatment of the genders is evidence of harassment but is not a requirement:

> In a Title VII sexual harassment case, the focus is on whether there is an allegation or evidence that the plaintiff suffered sexual harassment based

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3. Whether this reading of *Doe* remains viable is questionable in light of the Supreme Court's decision to vacate and remand, without opinion, the Seventh Circuit's opinion on the basis of the holding in *Oncale.* Although the *Oncale* decision reiterates that the Supreme Court has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations," this language appears not to foreclose the possibility that it could be if such sexual content indicated that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

> on her sex. Disparate treatment of the genders is evidence of such harassment, but it is not a requirement. Thus, an employer that sexually harasses both genders equally is not insulated from Title VII liability. Instead, it would be liable for all of the sexual harassment it perpetrates because it is individuals, not classes, who suffer discrimination.

There, the primary issue was whether same-sex harassment was actionable. However, the court rejected the premise that "the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the opposite sex." Instead, the court, citing *Meritor Savings Bank FSB v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), for the proposition that the focus of sexual harassment is on the victim, not the harasser, determined that disparate treatment of the genders is not required in a Title VII sexual harassment case.

Finally, in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir.1994), the Ninth Circuit held that the fact that a supervisor harasses males and females alike is not a valid defense to sexual harassment and would not preclude a showing that the harassment was based on gender. In *Steiner,* the female plaintiff worked as a blackjack dealer and eventually a floor person at the Showboat Hotel. Her supervisor, Trenkle, subjected her to offensive names based on her gender, such as "dumb fucking broad," "cunt," and "fucking cunt". In addition, Trenkle utilized sexually explicit language when reprimanding her in front of customers. An investigation into Trenkle's behavior demonstrated that he

was abusive to men and women alike, but his abusive treatment and remarks toward women were of a sexual or gender specific nature. After the plaintiff brought suit, Trenkle argued that he did not accord males and females different treatment and thus, did not discriminate on the basis of gender.

In response to this argument, the Ninth Circuit concluded:

> Furthermore, even if Trenkle used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby "cure" his conduct toward women . . . [A]lthough words from a man to a man are differently received than words from a man to a woman, we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle for sexual harassment.

Steiner, 25 F.3d at 1464. In line with this response, the Ninth Circuit reversed the district court's grant of summary judgment.

Prior to the *Oncale* decision, these cases created the impression that it was possible for both males and females to be sexually harassed by an "equal opportunity harasser." This impression was created by language in these cases which suggested that disparate treatment was not necessarily the gravamen of a sex discrimination claim where the harassing conduct itself demonstrated some gender animus. However,

in light of the Supreme Court's reaffirmation that proof that *discrimination is "because of sex" requires a showing that* "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," *Oncale,* 523 U.S. at __, 118 S.Ct. at 1001, the implications in these cases are of questionable significance. While the court acknowledges plaintiffs' arguments that the very sexual nature of the harassment is sufficient to demonstrate that the harassing conduct would not have occurred "but for" the sex of each plaintiff, *Oncale* clearly indicates that this is not necessarily a foregone conclusion:

> We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

Oncale, 523 U.S. at __, 118 S.Ct. at 1001. Further, the Fifth Circuit recently recognized this portion of the *Oncale* holding as "explicitly recogniz[ing] that sexual content is not the Title VII talisman." *Butler v. Ysleta Independent School District,* 161 F.3d 263, 270 (5th Cir.1998). Thus, the Seventh Circuit's recognition in *Doe* that harassment which is sexual in content is always actionable is no longer convincing.

Finally, a brief perusal of cases decided since *Oncale* leads the court to the conclusion that the equal opportunity harasser escapes the purview of Title VII liability. *See, e.g., Butler,* 161 F.3d 263, 270 ("Irwin's sending of offensive materials to both men and women is evidence that the

workplace itself, while perhaps more sexually charged than necessary, was not sexually charged in a way that made it a hostile environment for either men or women."); *Romero v. Caribbean Restaurants, Inc.*, 14 F.Supp.2d 185, 187 (D.P.R.1998) (rejecting Title VII same-sex hostile work environment sexual harassment claim where harasser subjected both male and female employees to lewd behavior); *Raum v. Laidlaw, Ltd.*, No. 97-CV-111, 1998 WL 357325 (N.D.N.Y. July 1, 1998) (dismissing Title VII same-sex hostile work environment sexual harassment claim where plaintiff failed to allege "discrimination . . . because of sex" and alleged harasser merely "engaged in conduct that some people of either gender may consider to be rude or vulgar behavior").

With these theoretical underpinnings set forth, the court turns now to the complaint in the present case. The Holmans each allege conduct of a sexual nature by their supervisor which occurred because of their respective genders. With respect to Mrs. Holman, the complaint alleges that Uhrich asked her to go to bed with him, touched her body, stood too closely to her and made sexist comments. When she refused the requests, she alleges that she received negative performance evaluations. In contrast, Mr. Holman alleges that Uhrich grabbed his head while asking for sexual favors. Upon his refusal, Mr. Holman alleges that Uhrich destroyed some of his belongings in his locker. From these allegations, it is clear that each suffered harassment which involved requests for sexual favors. Thus, neither was subjected to disadvantageous terms or conditions of employment to which members of the other sex were not exposed. For this reason, the court must dismiss the sexual harassment claims.

Often the court is placed in the position of being the mediator between the reality of legal doctrine and the dictates of common sense. The court cannot deny that this is such a case. Certainly, the court is cognizant that to decide as it does creates an anomalous result in sexual harassment jurisprudence which leads to the questionable result that a supervisor who harasses either a man or a woman can be liable but a supervisor who harasses both cannot be. While the court finds that the equal opportunity harasser escapes liability in the present case, it is not condoning the existence of such conduct in the workplace. Simply put, the court concludes that, under current Title VII jurisprudence, conduct occurring equally to members of both genders cannot be discrimination "because of sex." Title VII is not a "general civility code for the American workplace." *Oncale*, __ U.S. at __, 118 S.Ct. at 1002. As such, it does not prohibit all verbal or physical harassment. *Id.*

CONCLUSION

Based on the foregoing, the court DENIES Plaintiff's Motion for Reconsideration of this court's previous order granting the Defendants' Motion to Dismiss. The original Order GRANTING Defendants' Motion to Dismiss the sexual harassment claims is hereby REINSTATED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION DATED SEPTEMBER 8, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CIVIL NO. 1:97cv178

STEVEN J. HOLMAN and KAREN L. HOLMAN,

Plaintiffs,

v.

STATE OF INDIANA and INDIANA DEPARTMENT OF TRANSPORTATION,

Defendants.

ORDER

This matter is before the court on a motion to dismiss filed by the defendants on July 24, 1997. The defendants filed a supplemental brief on August 8, 1997, and the plaintiffs filed their responsive brief on August 12, 1997. On August 25, 1997, the court was advised by counsel for the defendants that no reply brief would be filed. For the following reasons, the motion to dismiss will be granted with respect to the plaintiffs' claims of sexual harassment. The plaintiffs' Equal Pay Act claims and claims of retaliation will not be dismissed.

Appendix C

Discussion

The plaintiffs, Steven and Karen Holman, have brought this action against their employer, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*. The Holmans allege that they have each been subjected to discrimination on the basis of sex in the form of sexual harassment in the workplace. Each of the Holmans allege that they were harassed by the same individual, Gale Ulrich, a male.

The defendants have filed a motion to dismiss for failure to state a claim[1]. The defendants argue that the allegations in the Complaint show that the alleged discrimination was not based on the sex of the plaintiffs, as each plaintiff has alleged sexual harassment by the same person.

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). To survive a motion to dismiss, each of the plaintiff must show that "*but for the fact of [his or her] sex* [he or she would not have been the object of harassment."

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1. The Plaintiffs have clearly alleged Equal Pay Act claims, and retaliation claims, as well as sexual harassment claims. Although the defendants cryptically state that they seek to have the entire complaint dismissed, they have failed to address either the Equal Pay Act or retaliation claims. Therefore, this court will construe the defendants' motion as only applicable to the plaintiffs' claims of sexual harassment.

Henson v. City of Dundee, 682 F.2d 897, 904, 905 n.11 (11th Cir. 1982) (emphasis added). Title VII does not provide a remedy for sexual misconduct if gender discrimination is not the purpose or effect of the alleged harassing behavior. *Weisheimer v. Rockwell, Int'l*, 754 F. Supp. 1559, *aff'd mem.*, 949 F.2d 1262 (11th Cir. 1991).

The Seventh Circuit Court of Appeals recently re-affirmed that "[h]arassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex." *Pasqua v. Metropolitan Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996). The Seventh Circuit then quoted the Eleventh Circuit's opinion in *Henson*, 682 F.2d at 904:

> [T]here may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, sexual harassment would not be based on sex because men and women are accorded like treatment . . . [and] the plaintiff would have no remedy under Title VII.

The defendants argue that since Ulrich, the plaintiffs' supervisor, made alleged sexual overtures to both plaintiffs, the sexual harassment clearly was not based on sex.

The plaintiffs rely on *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60, 63 (D.P.R. 1995), in support of their argument that allegations of sexual harassment consisting of sexual advances and physical touching permit an inference

that the victim's gender was the basis of the harassment. However, the issue in *Nogueras* was whether female-on-female sexual harassment could be the basis of a claim under Title VII. The female harasser in *Nogueras* was not alleged to be bi-sexual, nor was there any evidence that she harassed males as well as females. Thus, *Nogueras* is of extremely limited value in the present case.

The plaintiffs also cites to *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D.C. Wyo. 1993). However, the court in *Chiapuzio* simply held that "the equal harassment of both genders does not escape the purview of Title VII *in the instant case*." 826 F. Supp. at 1337 (emphasis added). The facts in *Chiapuzio* were completely different than the facts in the present case. In fact, the *Chiapuzio* court expressly noted that the harasser in that case was different from the "theoretical bi-sexual harasser":

> [A] critical difference between the theoretical bi-sexual harasser and Bell is that Bell intended to demean and, therefore, harm Dale Chiapuzio and Clint Bean because each was male. *See e.g.*, *Defective Paradigm*, 8 Yale L. & Pol'y Rev. at 352. (footnote omitted). Bell often made his remarks in front of the plaintiffs, their respective spouses and other employees. The remarks typically concerned Bell's sexual prowess and included graphic descriptions of sexual acts Bell desired to perform with various *female* employees — here Carla Chiapuzio, Clint Bean's wife and Christina Vironet. Bell never harassed male employees concerning sexual acts he desired to perform with them. Thus, the nature of Bell's

> remarks indicates that he harassed the plaintiffs because of their gender and constitute exactly the type of harassment contemplated to fall within the purview of Title VII.

826 F. Supp. at 1337-38.

It is clear that in *Chiapuzio* the harasser did not harass both genders equally. In the present case, however, the complaint alleges that Ulrich sexually harassed both genders. Such harassment "is equally offensive to male and female workers." *Henson*, *supra*. It is clear that such conduct, as it is directed to both sexes, simply does not satisfy the "but for" test. *Pasqua*, *supra*.

As the plaintiffs have failed to allege that the harassment they suffered was based on gender, they have failed to state a claim for harassment under Title VII, and the defendants' motion to dismiss this claim must be granted.

Conclusion

For all of the foregoing reasons, the defendants' motion to dismiss is hereby GRANTED, and the plaintiffs' claims of sexual harassment are hereby DISMISSED. The plaintiffs' Equal Pay Act claims and claims of retaliation will not be dismissed at this time.

Enter: September 8, 1997.

s/ William C. Lee
William C. Lee, Chief Judge
United States District Court